CONTRACT FOR SERVICES

This Contract for Services ("Contract") is made effective as of <u>6/1/2021</u>, by and between <u>Rapid City Public Library</u> of <u>Rapid City, SD 57701</u> ("Client"), and ByWater Solutions LLC, of Santa Barbara, California 93102 ("ByWater").

1. TERM. The service term shall be effective from <u>10/25</u>, 2021 to <u>10/25</u> 2023. Upon completion of this initial term, the Contract will renew for additional two-year terms. Either party must notify the other in writing sixty (60) days prior to the end of the then-current Term of their intention to modify or discontinue the Contract. Renewal Contract will reflect no more than a 3% increase to annual support and hosting costs. This contract will expire if not executed within 60 days of the effective date listed above.

2. DESCRIPTION OF SERVICES. ByWater will provide the Client the following services (collectively, the "Services"):

(a)   Installation and Implementation of the Aspen Discovery System ("Aspen"), including the customization and configuration of the public interface to meet the Client's style guidelines.
    (1) Implementation will include the integration with existing API connections for third-party systems free of charge
    (2) Data extraction (if applicable) from current system is the responsibility of the Client.
    (3) Testing of initial installation is the responsibility of the Client.
    (4) Aspen enables the application of Client logos, preferred fonts and colors interface.
    (5) Database size increases by more than 50% throughout the life of this Contract will result in pricing increases.

(b)   Terms regarding technical support for the Client are as follows:
    (1) Critical support will be available (24) hours per day, 7 days per week. Critical support includes system failure or complete loss of access to the Aspen system. Other support calls during hours in which the Client's facility is closed will be addressed by level of importance; i.e. system failure dictates immediate response time, training questions will be addressed within 24 hours;
    (2) The support package will also cover software updates and Aspen enhancements that may be applicable to the Client.

(c)   Hosting for the Client's data will be located in a remote cloud, and Service providers may change at any time, at the absolute and sole discretion of ByWater. ByWater will not be responsible for force majeure events including

natural disasters and communication line failures that may cause data corruption.

     (d)   Training is required and will be provided via webinar. Additional training will be provided upon request of Client. Clients not previously using Aspen as the library's Discovery must receive training.

3. PAYMENT FOR SERVICES. In exchange for the Services the Client will pay ByWater according to the following schedule:

     (a) Installation/Configuration: $3,750.00 payment invoiced upon signing of this Contract.

     (b) Annual support and hosting fee: $7,500.00, due on or before 10/25 of each year, beginning on 10/25, 2021.

     (c) Webinar Training: $0.00. Included for current ByWater partners

Payments not received within 60 days of the due date will result in termination of support services until receipt of payment. Payment not received within 90 days of due date shall result in termination of hosting services until receipt of payment. Payments may be made via check and direct deposits (ACH). Alternate payment methods will result in a convenience fee based on a sliding scale. For avoidance of doubt, any delay in implementation of the Software requested or caused by the Client shall not be grounds for the Client to likewise delay payment of any fees then due and owing.

4. WORK PRODUCT OWNERSHIP. Any copyrightable works, ideas, discoveries, inventions, patents, products, or other information (collectively the "Work Product") developed in whole or in part by ByWater solely in connection with the Services will be the exclusive property of the Client. Upon request, ByWater will execute all documents necessary to confirm or perfect the ownership of the Client to the Work Product. All such Work Product developed on behalf of the Client will be made available under the terms of the open source license in effect for Aspen at the time the code is written (currently GPL v2). Upon request, a copy of the code will be given to the Client even though the code may be hosted. Upon expiration or termination of this Contract, ByWater will: (a) return to the Client all records, notes, documentation and other items owned by the Client that were used, created, or controlled by ByWater during the term of this Contract; and (b) assist Client in exporting data from ByWater's data cloud to Client, at no additional charge.

5. CONFIDENTIALITY. ByWater, and its employees, agents, or representatives will not at any time or in any manner, either directly or indirectly, use for the personal benefit of ByWater, or divulge, disclose, or communicate in any manner, any information that is proprietary to the Client, except (a) if and to the extent the information is already a matter of public knowledge; (b)

such disclosures as may be necessary to ByWater's attorney or accountant (collectively, "Permitted Confidants"); or (c) such disclosures as are required by law or by any litigation between the parties hereto with respect to this Contract. ByWater shall also timely require each of its Permitted Confidants to keep that information confidential. Before making any disclosure required by law, ByWater, or the Permitted Confidant, as the case may be, shall give Client as much notice thereof as is legally permitted, along with a copy of the proposed disclosure. The foregoing duties of confidentiality shall survive the termination of this Contract.

6. RELATIONSHIP OF PARTIES. Client and ByWater agree that the status of ByWater is that of independent contractor, and not that of employee, principal, agent or joint venture partner of Client. Neither party has authority to enter into contracts or assume any obligations for or on behalf of the other party or to make any warranties or representations for or on behalf of the other party.

7. WARRANTY. ByWater shall provide the Services and meet its obligations under this Contract in a timely and workmanlike manner, using knowledge and recommendations for performing the Services which meet generally accepted standards in ByWater's industry. Aside from the express warranties stated in this Contract, ByWater hereby disclaims any and all other warranties related to the products and services offered under this Contract, including but not limited to warranties of non-infringement, merchantability or fitness for a particular purpose, and whether such warranties are oral or written, express or implied. ByWater does not in any way warrant that Aspen will operate without interruption or be error free. ByWater shall have no liability for damages resulting from the following, including, but not limited to: hosting inoperability, interruption due to product or delivered software malfunction (provided that regular daily backups are conducted by ByWater), loss of profits, goodwill, damage or loss of data, or any other indirect, special or consequential damages suffered by Client.

8. REMEDIES. If Client or ByWater fails to perform its obligations under this Contract, the non-breaching party shall have the right to terminate the Contract and to seek whatever remedy may be available to it, either in law or in equity. In the event that a claim or cause of action arises out of the interpretation, performance, or breach of this contract, the prevailing party shall be entitled to a reasonable attorney's fee in addition to costs of suit. The parties hereto hereby consent to the personal jurisdiction and venue of the State of South Dakota with respect to any claim or cause of action arising from this Contract, and hereby waive any objection to such venue based upon the doctrine of forum non conveniens.

9. LIMITATION OF LIABILITY. BYWATER WILL HAVE NO LIABILITY FOR ANY INDIRECT, CONSEQUENTIAL, EXEMPLARY, SPECIAL, INCIDENTAL,OR PUNITIVE DAMAGES FOR ANY MATTER ARISING FROM OR RELATING TO THIS CONTRACT OR THE PRODUCTS AND SERVICES, INCLUDING BUT NOT LIMITED TO ANY UNAUTHORIZED ACCESS TO, OR ALTERATION, THEFT, LOSS, INACCURACY, OR DESTRUCTION OF INFORMATION OR DATA COLLECTED, STORED, DISTRIBUTED, OR MADE AVAILABLE VIA THE PRODUCTS AND SERVICES, CLIENT'S USE OR

INABILITY TO USE THE PRODUCTS AND SERVICES, ANY CHANGES TO OR INACCESSIBILITY OF THE PRODUCTS AND SERVICES, ANY DELAY OR FAILURE OF THE SERVICES, OR FOR LOST PROFITS, OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES, EVEN IF BYWATER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN ANY EVENT, BYWATER'S LIABILITY TO CLIENT FOR ANY REASON AND UPON ANY CAUSE OF ACTION WILL BE LIMITED TO THE AMOUNT CLIENT ACTUALLY PAID BYWATER FOR THE INDIVIDUAL BYWATER PRODUCTS OR SERVICES COVERED UNDER THIS CONTRACT OVER THE 12 MONTHS PRIOR TO WHICH SUCH CLAIM AROSE. THIS LIMITATION APPLIES TO ALL CAUSES OF ACTION IN THE AGGREGATE, INCLUDING, BUT NOT LIMITED TO, BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, MISREPRESENTATIONS, AND OTHER TORTS. FEES UNDER THIS CONTRACT ARE BASED UPON THIS ALLOCATION OF RISK. THIS SECTION WILL NOT APPLY TO DAMAGES THAT CANNOT BE LIMITED OR EXCLUDED BY LAW (IN WHICH EVENT THE LIABILITY SHALL BE LIMITED TO THE FULLEST EXTENT PERMITTED).

10. ENTIRE AGREEMENT. This Contract contains the entire agreement of the parties, and there are no other promises or conditions in any other Contract whether oral or written concerning the subject matter of this Contract. This Contract supersedes any prior written or oral Contracts between the parties.

11. SEVERABILITY. If any provision of this Contract will be held to be invalid or unenforceable for any reason, the remaining provisions will continue to be valid and enforceable, provided that no party is, as a result thereof, deprived of its substantial benefits under this Contract. If a court finds that any provision of this Contract is invalid or unenforceable, but that by limiting such provision it would become valid and enforceable, then such provision will be deemed to be written, construed, and enforced as so limited.

12. AMENDMENT. This Contract may only be changed, modified, amended or discharged by a Contract in writing executed by the parties hereto.

13. GOVERNING LAW. This Contract shall be construed in accordance with the laws of the State of South Dakota.

14. NOTICE. Any notice or communication required or permitted under this Contract shall be sufficiently given if delivered in person or by certified mail, return receipt requested, to the address set forth in the opening paragraph or to such other address as one party may have furnished to the other in writing.

15. ASSIGNMENT. The Client may not assign or transfer this Contract without the prior written consent of ByWater.

16. BINDING EFFECT. This Contract shall inure to the benefit of and be binding upon the parties named herein and their respective heirs, successors and assigns.

17. EXECUTION. This Contract may be executed in two or more counterparts, each of which together shall be deemed an original, but all of which together shall constitute one and the same instrument. In the event that any signature is delivered by facsimile transmission or by e-mail delivery of a ".pdf" format data file, such signature shall create a valid and binding obligation of the Party executing (or on whose behalf such signature is executed) with the same force and effect as if such facsimile or ".pdf" signature page were an original hereof.

18. INDEMNIFICATION.   The parties hereto shall fully indemnify, hold harmless and defend one another from and against all claims, demands, actions, suits, damages, liabilities, losses, settlements, judgments, costs and expenses (including but not limited to reasonable attorney's fees and costs) (collectively, "Claims") which arise out of or relate to (1) its breach of any representation or warranty of a party hereto contained in this Contract, (2) its breach or violation of any covenant or other obligation or duty of a party hereto under this Contract or under applicable law, in each case whether or not caused by its negligence and whether or not the relevant Claim has merit. Neither ByWater nor Client shall be liable to the other for loss, damage, or delay in the work caused by war, riot, the act or order of any competent civil or military authority, strikes, unauthorized work stoppage or by rain, fire, flood, act of God, epidemic, and CDC recognized pandemic or by any cause which is unavoidable and beyond its reasonable control. In addition, neither party shall be liable for loss or damage suffered by the other party or any third party that is not caused by the employees, agents or equipment of the party sought to be liable.

19. NON APPROPRIATION. The terms of this Agreement and any purchase order issued for multiple years under this Agreement are expressly contingent upon sufficient appropriations being made by the Common Council of the City of Rapid City. Notwithstanding any other provision of this Agreement, the City shall not be obligated for the Contractor's performance hereunder or by any provision herein during any of the City's future fiscal years unless and until the Common Council appropriates sufficient funds for payment of the City's obligations of this Agreement. In the event that sufficient funds are not appropriated for this Agreement, then this Agreement shall terminate as of December 31 of the last fiscal year for which funds were appropriated. The City shall notify the Contractor in writing of any such non-appropriation of funds within thirty days of the effective date of the City's annual appropriation ordinance.

RAPID CITY PUBLIC LIBRARY

By: _____

Name: _____
Title: _____

BYWATER SOLUTIONS LLC

By: _____

Name: Brendan Gallagher
Title: Chief Executive Officer
Duly Authorized

Date:_____